No. 331

In the Supreme Court of the United States

OCTOBER TERM, 1943

CAPITOL GREYHOUND LINES AND CAPITOL GREYHOUND LINES OF LOUISIANA, LTD., PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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CITATIONS

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No. 991

CAPITOL GREYHOUND LINES AND CAPITOL GREYHOUND LINES OF INDIANA, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 268–277) is reported in 140 F. (2d) 754. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 19–38, 42–50) are reported in 49 N. L. R. B. 156.

JURISDICTION

The decree of the court below (R. 267) was entered on January 31, 1944. A petition for rehearing, filed by petitioners on March 1, 1944 (R. 279–280), was denied on April 7, 1944 (R. 287). The petition for a writ of certiorari was filed on

May 11, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether an election in which 63 employees voted out of a total of 73 on the eligibility list should be set aside because of the Board's failure to make a special canvass of those who were prevented from voting by illness, their duties, or active military service.

2. Whether upon discovering, subsequent to the announcement of the results of an election conducted by secret ballot, that an employee whose name appeared on the eligibility list stipulated by all parties, and who voted without challenge, was in fact ineligible, the Board must treat him as having voted for the union and deduct his vote from the number cast for the union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra,* pp. 19–21.

STATEMENT

On August 22, 1942, petitioners and the Union[1] entered into, and the Regional Director approved,

[1] Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 1299, affiliated with the American Federation of Labor.

an "Agreement for Consent Election" upon a form customarily provided by the Board to facilitate the determination of questions concerning representation (R. 129–134). This agreement stipulated that all bus drivers employed by petitioners constituted a unit appropriate for the purposes of collective bargaining, and that an election should be held under the Regional Director's supervision "among all employees in the Unit who were employed by the Employer during the pay-roll period ending July 31, 1942, including employees who did not work during such pay-roll period because they were ill or on vacation or in the active military service or training of the United States * * *" (R. 129–130). It also provided that the election should be held "in accordance with the Act, the Rules and Regulations and the customary procedures and policies of the Board," and that "the determination of the Regional Director shall be final and binding upon any question (including questions as to the eligibility of voters) raised by either party hereto relating in any manner to the election and not specifically covered in this Agreement" (R. 130).

It was further provided that the election be held on September 2, 1942, at specified places and times set forth in a schedule attached to the agreement and marked "Annex A"; that petitioners post notices of the election furnished by the Regional Director at "conspicuous and usual posting places easily accessible to the eligible voters";

and that annexed to the agreement, and marked "Annex B," was a list "which all parties agree constitutes the sole and exclusive list of eligible voters" (R. 130–131). "Annex A" provided that the voting should take place between certain specified hours at Cincinnati, Ohio; Louisville, Kentucky; Flora, Illinois; St. Louis, Missouri; Clarksburg, West Virginia; and Washington, D. C. (R. 133). "Annex B" was a list of the eligible voters prepared by petitioners,[2] containing the names of 73 employees in alphabetical order, among them employee Nolan who petitioners later contended was erroneously included in the list (R. 133–134).

Thereafter, the Regional Director filled in the usual printed "Notice of Election," to which was attached a typewritten "Voting Schedule," which had been submitted by petitioners (R. 102, 110–111, 159), containing the names of all the employees eligible to vote (including Nolan's name), and designating the particular polling places and hours at which they were to vote (R. 101–102, 110–111, 135).[3] There was also a note on the "Voting Schedule" stating that "If any employee cannot

[2] Both "Annex A" and "Annex B" were prepared and submitted by petitioners, who, at the request of the Regional Director, brought them to the meeting at which the consent election agreement was signed (R. 62–63, 101–102, 185).

[3] Such a typewritten "Voting Schedule" specifying the eligible voters at each particular place is not normally attached to the printed "Notice of Election," but it was used in this case because of the number of polling places involved (R. 101–102, 110, 111, 112).

vote at the place designated for him, he may vote at any of the other polling places if he appears while the polls are open" (R. 135). These notices were posted at the various cities in which voting was to take place about 1 week prior to the election (R. 108, 63, 130).

The balloting was conducted at the various polling places on September 2, and a "Certification on Conduct of Election" was submitted for each polling place (including that at which Nolan was scheduled to vote), signed by observers on behalf of petitioners, the Union, and the Regional Director (R. 137–142).[4] These certifications stated that the balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote (R. 137–142). On September 4, 1942, the ballots were counted and a "Certification of Counting and Tabulating of Ballots" was executed by representatives of petitioners, the Union, and the Regional Director (R. 105–106, 143–144). This certification disclosed that the total number of employees on the eligibility list was 73, that a total of 63 ballots were cast, and that of these 32 were cast for the Union, 30 against the Union, and one

[4] At Clarksburg, West Virginia, only the Regional Director was represented (R. 63–64, 142). The "Voting Schedule" lists Washington, D. C., as the place at which Nolan was to vote (R. 135), although the record does not disclose whether he did vote there (R. 187–188, 230–231).

ballot was challenged and not counted (R. 104–105, 143–146).

The Regional Director notified the parties of the results of the election (R. 71, 143), and on September 9, 1942, petitioners filed with the Regional Director "Objections to the Conduct of Ballot in Consent Election," in which they objected to "any determination of results based" upon the consent election (R. 147–149). In these objections petitioners contended that the election was invalid because the Board did not make provision for voting by eight employees who failed to appear at the polls (four because they were in active military service, two because of illness and two because their work prevented their reaching the polling places while they were open), denied the right to vote to employee Thomas, whose ballot had been challenged on the ground that he was a supervisor, and improperly received the ballot of Nolan, who was not entitled to vote because he was not employed during the pay-roll period ending July 31, 1942, as required by the consent election agreement (*supra,* p. 3), although his name was erroneously on the list of eligible voters attached to that agreement (R. 147–149).

On October 27, the Regional Director held a formal hearing on petitioners' objections (R. 71, 86–87, 165–262). Witnesses were called to testify, documentary evidence was introduced, and a transcript of the proceedings was made (R. 165–

262). At the hearing, petitioners urged, despite the fact that at no time prior to the counting of the ballots had petitioners or any of the employees notified the Board that anyone would be unable to vote under the stipulated election arrangements, that the Board should have made special provisions to obtain the ballots of the eight employees who failed to appear at the polls (R. 168–169).[5] With respect to Nolan, petitioners contended that his name had been erroneously[6]

[5] The "Voting Schedule," which petitioners had prepared, specified the places and times for voting by each of the eight employees (R. 101–102, 110–111, 135). The testimony showed that employees Fritz and Haines were ill on the day of the election (R. 170, 191–192, 208–214) and that employees Lynch, Fite, Cole, and Radcliff were in active military service (R. 169–170, 196, 253–256). Testimony was also adduced that their duties on the day of the election had made it inconvenient (R. 204, 207, 236) or impossible for employees Smith and Holcomb to get to the polls (R. 170–172, 193–195, 201–207, 215–220, 237–238).

[6] The claimed error was ascribed by petitioners to the circumstance that in preparing the eligibility list the pay roll of August 15 was inadvertently substituted for that of July 31 (R. 177, 185). So far as appears from the record the pay rolls of July 31 and August 15 were identical except for Nolan's inclusion on the latter and absence from the first. Petitioners contended that in fact Nolan was first employed on August 8 (R. 176–177, 224). There was evidence, however, that the first trip for which Nolan was paid by petitioners took place on August 7 (R. 252), as well as additional documentary evidence, concerning which the record was not developed, which indicated that Nolan was in petitioners' employ as a trainee at least as early as August 1 (R. 257).

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included on the eligibility list although they made no showing (1) that he had voted for the Union;[7] (2) that they did not acquire knowledge of their alleged mistake until after the election;[8] (3) that Nolan was not employed in the appropriate bargaining unit at the time of the election; or (4) that any employee had objected to Nolan's eligibility either prior to or after the election.

On November 24 the Regional Director issued his "Report on Consent Election," in which he overruled petitioners' objections and determined that the Union had been designated and selected by a majority of the employees in the agreed upon bargaining unit as the exclusive bargaining representative of all the employees within the unit (R. 150–153). With respect to petitioners' claim that the absentees had not been specially canvassed, the Regional Director pointed out that customary Board procedures had been followed as the parties had agreed, and that the claim with respect to Nolan was invalid since petitioners had not only agreed that he was an eligible voter but

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[7] No proof was introduced that Nolan had actually voted in the election. It was merely stipulated by counsel, admittedly without knowledge that it was true, and in the belief that it was immaterial, that Nolan had voted (R. 187–188, 230–231).

[8] When questioned as to the time of the discovery of the alleged error, Vice President Graves replied, "It was discovered in my office just around election time, I don't know before or after" (R. 185).

had failed to exercise their right to challenge him at the election (R. 151–152).[9]

Thereafter, upon the refusal of petitioners to negotiate with the Union (R. 74–75, 154–155), charges were filed that petitioners had violated the Act (R. 9). On April 27, 1943, following the usual proceedings pursuant to Section 10 of the Act, the Board issued its findings of fact, conclusions of law and order (R. 19–38, 42–50). The Board found that the rulings of the Regional Director on petitioners' objections to the conduct of the election were neither arbitrary nor capricious and hence were entitled to the finality and binding effect for which the parties had provided in the consent agreement (R. 46–47). It found that the Union had been duly designated by a majority of petitioners' employees in an appropriate bargaining unit and was, therefore, under Section 9 (a) of the Act, the exclusive representative of all the employees in such unit (R. 47).

The Board concluded that petitioners' refusal to bargain with the Union was an unfair labor practice within the meaning of Section 8 (1) and (5) of the Act (R. 48–49). It therefore ordered petitioners to cease and desist from their unfair labor practices, to bargain collectively with the Union, and to post appropriate notices (R. 49–50).

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[9] These determinations made it unnecessary for the Regional Director to rule upon Thomas' challenged ballot since it could not affect the outcome (R. 153).

On July 12, 1943, the Board filed in the court below a petition for enforcement of its order against petitioners (R. 1–4). On January 31, 1944, the court handed down its opinion (R. 268–277) and on the same date entered its decree (R. 267) sustaining the Board's findings as to the unfair labor practices and enforcing the Board's order in full.

ARGUMENT

1. Petitioners urge (Pet. 1–2, 12–15) that the election is invalid because no provision was made for obtaining the votes of those prevented by illness, their driving schedules or active military service from appearing at the polls.

While the agreement for the consent election, following the Board's usual practice,[10] included among those eligible to vote employees who because of illness, vacation, or military service did not work during the pay-roll period used to fix eligibility (R. 130), it made no provision for obtaining the votes of those who did not appear at the polls. On the contrary, by specifying for each employee named on the eligibility list the exact hours and place at which he should cast his ballot (R. 101–102, 110–111, 135), the agreement showed the intent of all parties that only those who appeared in person to cast their ballots should be allowed to vote. Furthermore petitioners, as

[10] Eighth Annual Report of the National Labor Relations Board (Govt. Print. Off., 1944), p. 50.

well as the employees involved, failed to notify the Regional Director in advance of the election, or even on the day thereof, that there were eligible voters who could not vote unless some special arrangement for obtaining their ballots was made (R. 107, 178, 182–183). Their subsequent objections based on the lack of such provision cannot survive the established principle of election law,[11] firmly maintained by the Board in its election procedure,[12] which bars a post-election contest over any asserted irregularities concerning which opportunity for protest was not exercised prior to the determination of the result.

Collateral circumstances emphasize petitioners' default. The times and places of balloting were agreed upon after a careful examination of peti-

[11] See, *Allen* v. *Glynn*, 17 Colo. 338, 29 Pac. 670, *Bowers* v. *Smith*, 111 Mo. 45, 20 S. W. 101; *Taylor* v. *Girard*, 54 Idaho 787, 36 P. (2d) 773 and cases cited; *Cave* v. *Conrad*, 24 N. E. (2d) 1010, 1012 (Ind.); *Welsh* v. *Shumway*, 232 Ill. 54, 83 N. E. 549; *Schuler* v. *Hogan*, 168 Ill. 369, 48 N. E. 195, 198; *Swiney* v. *Peden*, 306 Ill. 131, 137 N. E. 405; *Matter of Orgel*, 125 N. Y. S. 291, 140 App. Div. 410; *Martin* v. *McGarr*, 27 Okla. 653, 117 Pac. 323.

[12] Cf. *Matter of Garod Radio Corp.*, 32 N. L. R. B. 1010 (where because no question about providing special facilities for voting of men drafted or ill was raised until after balloting was completed, objections were not sustained). See also, *Matter of Cudahy Packing Co.*, 4 N. L. R. B. 39, 41; *Matter of Combustion Engineering Co.*, 7 N. L. R. B. 123, 124–126; *Matter of R. C. Mahon Co.*, 9 N. L. R. B. 430, 431; *Matter of International Freighting Corp.*, 6 N. L. R. B. 271, 272; *Matter of American Granite Finishing Co.*, 28 N. L. R. B. 739; *Matter of Solvay Process Co.*, 37 N. L. R. B. 983.

tioners' bus schedules in order that all eligible voters might, in the normal course of business, have ample time to vote (R. 151, 227). Indeed, petitioners themselves submitted to the Regional Director the voting schedules used in the election which indicated the points at which each employee would vote (R. 101–102, 110–111, 135). These were posted the entire week preceding the election in plain view of all the employees (R. 63, 108, 130, 135). Thus, petitioners and the employees involved were in the best position to know who would be unable to vote and to suggest the making of other arrangements. Responsibility for the nonparticipation of these employees in the election can therefore scarcely be attributable to the Regional Director who, as agreed upon by the parties, conducted the election "in accordance with the customary procedure and policies of the Board"[13] (*supra*, p. 3).

2. Apart from the fact that petitioners cannot now complain that the Regional Director failed to ignore their wishes as to the manner in which the election was to be conducted, their contention with respect to the four employees who did not participate in the election because of illness or other duties is unsound. Industrial elections, like political elections, would not be workable if an additional canvass had to be conducted among

[13] See, for example, *Matter of Schwartz-Bernard Cigar Co.*, 7 N. L. R. B. 503.

those who, for one reason or another, failed to appear at the polls. Cf. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 560–561; *Nashville, Chattanooga & St. Louis Ry.* v. *Ry. Employees' Dept.*, 93 F. (2d) 340 (C. C. A. 6); *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 114 F. (2d) 144, 148–149 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *National Mineral Co.*, 134 F. (2d) 424 (C. C. A. 7), certiorari denied, 320 U. S. 753.[14]

3. Similarly, it is clear that the failure of the Board to poll four employees in active military service does not invalidate the election.[15] Nothing in the Act requires that employees absent for that reason be regarded as currently within the bargaining unit, although it was proper for the Board in the exercise of its discretion to treat them as such. In any event, the election was conducted in accordance with that customary administrative practice which the parties agreed should prevail. After a year of administrative experience in the matter, the Board thus explained in *Matter of Wilson & Co., Inc.*, 37 N. L. R. B. 944, 951–952 (1941) its reasons for abandoning in its election

[14] The cases cited in the Petition (pp. 11, 12, 14, 17) do not hold to the contrary; they merely assert the majority rule principle which is written into Section 9 (a) of the Act (*infra*, p. 19) and which was followed by the Board in this case (*supra*, p. 9).

[15] Cf. *Karloftis* v. *Helton*, 178 S. W. (2d) 959 (Ky. Ct. App.), certiorari denied, No. 982, this Term.

procedure mail balloting for those in active military service:

> While the reasons which impelled our adoption of the policy of extending eligibility to this group of employees are equally valid today, administrative experience in the ensuing months has demonstrated conclusively that it is impracticable to provide for mail balloting by this group. Administrative difficulties in determining the present location of men in military service have constantly increased with concomitant delays in arrangements for elections. The actual voting of the group by mail has seriously retarded the completion of elections in many cases, since substantial time has had to be allowed for receipt and return of mail ballots by eligibles in remote sections of the country. In addition, this form of balloting has frequently raised material and substantial issues relating to the conduct of the ballot and the election. On the other hand, actual returns from such mail ballots have been relatively small. Since time is of the essence in finally determining a collective bargaining agent when questions concerning representation affecting commerce arise, we are of the opinion that the policies and purposes of the Act will be best effectuated by continuing to recognize the eligibility of this group of employees but by discontinuing the practice of mail balloting.

> Accordingly, we are construing the eligibility provision in our directions of election relating to this group of employees to provide only that those employees in the group who appear in person at the polls to cast a ballot are entitled to vote, and we have administratively instructed our Regional Directors to that effect.[16]

4. Petitioners further contend (Pet. 2, 16–21) that the election is invalid because employee Nolan, whose name was erroneously included on the list of eligible voters, was allowed to cast a ballot. However, although petitioners and the employees, who had agreed to the eligible list, knew a number of days before the election that Nolan was listed as an eligible voter, they did not challenge or otherwise protest his vote prior to the completion of the balloting. The Board's election procedure, as in political elections,[17] bars post-election attacks upon eligibility where a party withholds exercising a challenge until after the determination of the results of the election. *Matter of Kellogg Switchboard & Supply Co.*, 28

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[16] Reaffirmed in *Matter of Edwin L. Wiegand Co.*, 44 N. L. R. B. 315, 317–318 (1942) and more recently, in *Matter of Mine Safety Appliances Co.*, 55 N. L. R. B., No. 215 (1944).

[17] *Davis* v. *Town of Saluda*, 147 S. C. 498, 145 S. E. 412; *Turregano* v. *Whittington*, 132 La. 454, 61 So. 525.

N. L. R. B. 847, 852; *Matter of Cudahy Packing Co.*, 4 N. L. R. B. 39, 41; *Matter of American Granite Finishing Co.*, 28 N. L. R. B. 739. Unless challenges are made prior to the voting, segregation of the ballots[18] is impossible, and a determination of ineligibility necessitates setting aside the whole election although in fact the ineligible voter may not have been included in the majority. Reasons for adherence to this doctrine clothing the election process with finality are peculiarly pressing here in view of petitioners preparation of the eligibility list[19] and failure to show that the alleged error was not discovered until after the election (*supra*, pp. 7–8). Cf. *Mehling* v. *Moorehead*, 133 Ohio St. 395, 14 N. E. (2d) 15.[20]

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[18] As the handling of Thomas' ballot shows (R. 143, 148, 223), challenged ballots are segregated by the Board.

[19] Petitioners (1) prepared the eligibility list and agreed that it was "the sole and exclusive list of eligible voters" (*supra*, p. 4n); (2) placed Nolan's name and an assigned polling station on voting schedules which they prepared (R. 101–102, 110–111, 135); (3) signed a "Certification on Conduct of Election" (R. 139) attesting that the balloting was fairly conducted and that all eligible voters were given an opportunity to vote at Washington, D. C., where Nolan was assigned to vote (R. 135); and (4) on the day of the election certified the accuracy of the total number of employees on the eligibility list (R. 143–144).

[20] Moreover, petitioners can show no prejudice from the Board's action. In a case such as this a pay-roll period prior to the date of the election is used to determine eligibility not for the purpose of qualifying the employer's bargaining obligation but to protect employees from changes effected

5. For the above reasons petitioners' contentions are without merit apart from their stipulation that the Regional Director's determinations were to be "final and binding." In addition, he ruled adversely to petitioners upon all the contentions here urged by them (R. 150–153). His determinations were certainly not unreasonable, and in the circumstances petitioners have no basis for attacking them. His ruling that voters had to present themselves at the polls was consistent with the terms of the agreement as well as with the Board's customary procedure. His decision that the election should not be upset because Nolan voted was entirely reasonable in view of the fact that, although the body of the agreement fixed eligibility by a pay roll ending just before Nolan began to work (*supra*, pp. 3, 7n), the attached list of eligible voters included him.

CONCLUSION

The decision below, enforcing the Board's order, is correct, and presents no conflict of decisions or

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by an employer subsequent to the agreement in order to influence the outcome of an election. See *Matter of Elliott Bay Lumber Co.* 9 N. L. R. B. 3. No claim is made that the Board denied others who were on the same pay-roll list as Nolan the right to vote, or that Nolan was not employed in the appropriate bargaining unit prior to the election, at the time of the election, and at the normally crucial time of the refusal to bargain.

question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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